109 - 3763

CERTIFICATE OF DIVISION.

SUPREME COURT OF THE UNITED STATES.

No. ~~776.~~ ~~460~~ 204

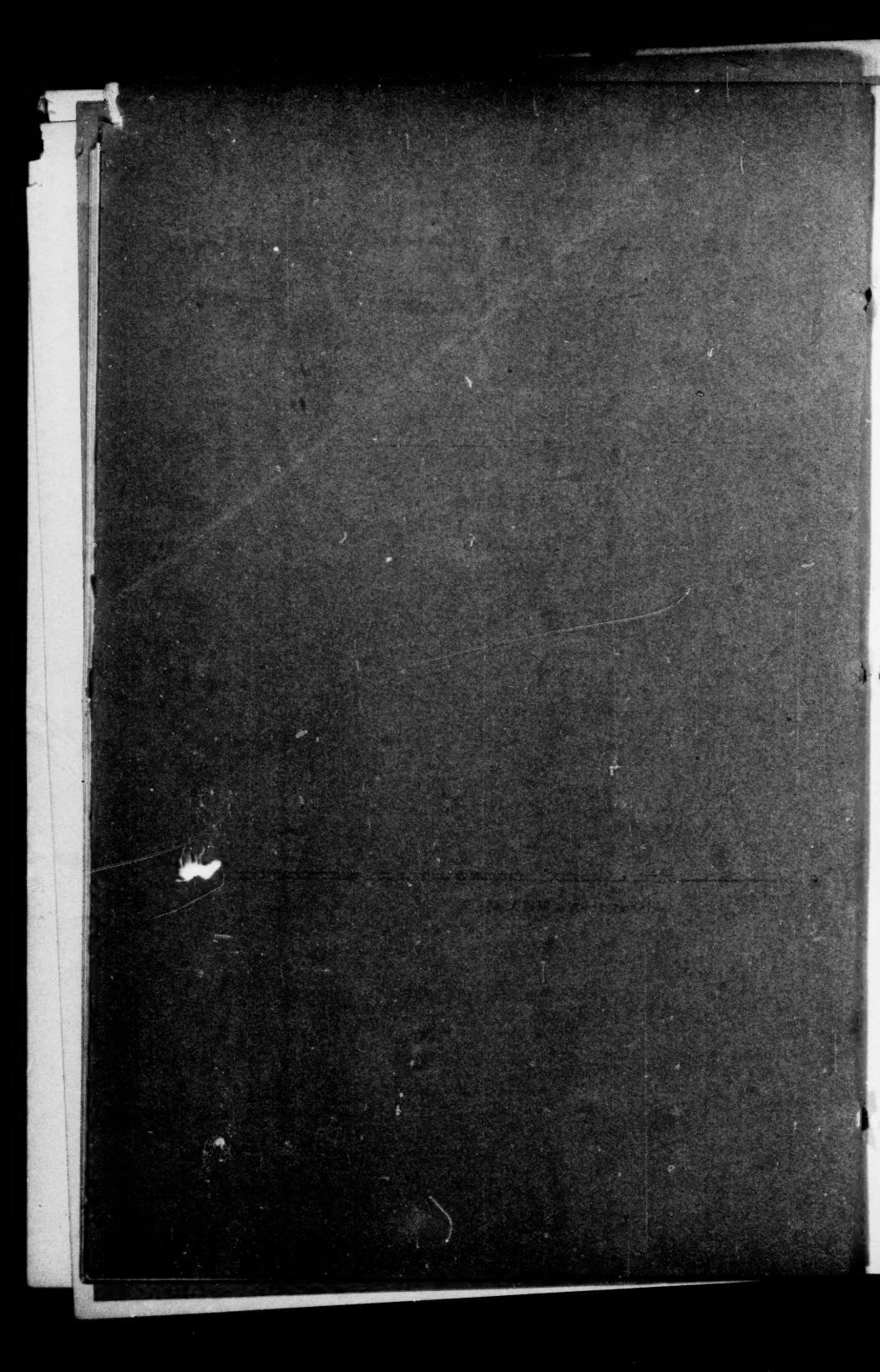
THE UNITED STATES, PLAINTIFF,

vs.

JAMES HAMILTON.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED NOVEMBER 23, 1880.



SUPREME COURT OF THE UNITED STATES.

No. 776.

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vs.

JAMES HAMILTON.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

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1 THE UNITED STATES OF AMERICA,
District of Middle Tennessee:

Circuit court of the United States for said district.

FIRST COUNT.

The grand jurors for the United States of America and district aforesaid being duly summoned, elected, sworn, empanneled and charged to enquire for the body of the district aforesaid, upon their oath aforesaid, present that on the 21st day of April, 1879, and divers other days before the day last aforesaid, within the district aforesaid, James Hamilton, being the agent of and conductor of a train of cars for the Nashville, Chattanooga and St. Louis Railway Company, a corporation duly incorporated by the legislature of Tennessee for the purpose of carrying on the business of a common carrier, did violate section 1 of an act of the Congress of the United States, entitled "An act to protect all citizens in their civil and legal rights," approved March 1st, 1875, by with force and arms and unlawfully denying to M. L. Porter, a citizen of the United
2 States, not for reasons by law applicable to citizens of every race and color but on account of her race, color, and previous condition of servitude, the full and equal enjoyment of the accommodations, advantages, and facilities and privileges of said train of cars accorded to other citizens, by refusing to convey her from Nashville to Lebanon, in the State of Tennessee, in a first-class, comfortable, and agreeable car or coach, and compelling her to ride in a dirty, disagreeable coach known as the smoking car, she, the said M. L. Porter, having purchased and paid the said Nashville, Chattanooga and St. Louis Railway Company for a ticket or pass entitling her to first-class, agreeable, and comfortable passage from said city of Nashville to the town of Lebanon, Tennessee, and having demanded of said James Hamilton that he convey her upon the terms and conditions to which she was entitled by virtue of her said ticket and pass, contrary to section 1 and 2 of said act of Congress of the United States in such case made and provided, and against the peace and dignity of the United States.

SECOND COUNT.

3 And the grand jurors aforesaid, upon their oath aforesaid, further present, that on the 21st day of April, 1879, and divers other days before the day last aforesaid, within the district aforesaid, the said James Hamilton, being the agent of and conductor of a train of cars belonging to the Nashville, Chattanooga and St. Louis Railway Company, a corporation duly incorporated by the legislature of Tennessee as a common carrier, which train was run by said company, through its agent, said James Hamilton, for the accommodation of the public from Nashville to Lebanon, in the State of Tennessee, did with force and arms and unlawfully deny M. L. Porter, a colored woman, the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of said train of cars accorded to citizens of her sex, for reasons not applicable to citizens of every race and color, but on account of her race, color, and previous condition of servitude, by subjecting her, in the enjoyment of said accommodations, to conditions and limitations not established by law, nor applicable to citizens of every race and
4 color, to wit, by refusing to convey her from Nashville to Lebanon,

in the State of Tennessee, in a first-class coach or car, on account of her race, color, and previous condition of servitude, she, the said M. L. Porter, having purchased from and paid the said corporation for a ticket or pass entitling her to ride in a first-class car from Nashville to Lebanon aforesaid, and claiming and demanding of said conductor at the time the like privileges and accommodations accorded to others of her sex traveling upon said train at the same time and to the same destination, contrary to the statute in such case made and provided, and against the peace and dignity of the United States.

(Signed) JAMES A. WARDER,
U. S. Attorney for Middle Tenn.

Which indictment was returned into court with the following endorsements upon the back thereof, to wit: United States circuit court for the district of Middle Tennessee. Indictment. The United States
5 versus James Hamilton. Violation of the civil rights act of March 1, 1875. Witnesses: F. J. Loudin, M. L. Porter, Jennie Jackson, Georgia M. Gordon. May 10, 1879. A true bill. (Signed) D. B. Cliffe, foreman of grand jury.

On October 28, 1880, the court having met pursuant to adjournment, present the Hon. John Baxter and the Hon. D. M. Key, the following proceedings were had, as appears from the minutes, to wit:

UNITED STATES }
vs.
JAMES HAMILTON. }

Came the attorney of the United States, and the defendant, by his attorney, moved the court to quash the indictment herein; which, being argued by counsel, is taken under advisement.

And on the same day the following proceedings were had, as
6 appears from the minutes of the court, to wit:

UNITED STATES }
vs.
JAMES HAMILTON. }

This the 28th day of October, 1880, Hon. John Baxter, circuit judge, and the Hon. David M. Key, district judge, presiding, upon motion of defendant, by his attorneys, to quash the indictment, the said judges were divided in opinion upon the following questions, to wit:

1st. Whether or not section 1st of the act of Congress, passed March 1, 1875, entitled "An act to protect all citizens in their civil and legal rights," is constitutional.

2nd. Whether or not, upon the facts alleged in the respective counts of the indictment, the defendant is guilty of a violation of said act of Congress of March 1, 1875, and punishable under the same.

3d. Whether the 14th amendment to the Constitution is merely intended as a prohibition upon the States and their officers, or does it also confer an immunity from discrimination on account of color, race, or previous condition of servitude, which Congress may protect
7 from violation by common carriers and their agents.

4th. Whether the 14th amendment to the Constitution of the United States and the said act of Congress covers and includes the case made against the defendant in either count of the indictment.

5th. Is the indictment in either count therein good and sufficient in law under the said act of Congress.

(Signed) JOHN BAXTER,
Circuit Judge, &c., &c.
D. M. KEY,
U. S. District Judge.

Which is stated upon request of the counsel on both sides, and hereby ordered to be certified under the seal of the court to the Supremo Court at their next session.

Court then adjourned until Monday morning, Nov. 15, 1880, at 10 o'cl. a. m.

D. M. KEY.

MIDDLE DISTRICT OF TENN.:

I, Lewis T. Baxter, cl'k of the U. S. circuit court for said district, do hereby certify that the foregoing is the record in the case of The U. S. vs. James Hamilton ordered to be certified by the court. Witness my hand & the seal of said court Nov. 16th, 1880.

[SEAL.] LEWIS T. BAXTER, *Cl'k.*

(Indorsement on cover:) No. 776. The United States, plaintiff, v. James Hamilton. Certificate of division. M. Tennessee C. C. U. S. Filed 23d November, 1880.

109-3 463

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

No. ~~26~~. 1 UNITED STATES *v.* MURRAY STANLEY.
No. ~~37~~. 2 UNITED STATES *v.* MICHAEL RYAN.
No. ~~105~~ 4 UNITED STATES *v.* SAMUEL NICHOLS.

CIVIL RIGHTS CASES.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 26. UNITED STATES *v.* MURRAY STANLEY.
No. 37. UNITED STATES *v.* MICHAEL RYAN.
No. 105. UNITED STATES *v.* SAMUEL NICHOLS.

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BRIEF FOR THE UNITED STATES.

The first and last of the above-entitled causes are indictments for denying to colored men the accommodations of an inn.

No. 37 is an *information* against Ryan for depriving a colored man of the right to a seat in the parquet of a theater in San Francisco.

Though the main question of the constitutionality of the civil rights act approved March 1, 1875, is the same in these three cases, which are therefore submitted together, the court below divided upon the question whether the indictment in the first case stated an offense, and a demurrer to the information was sustained in the second; so the first indictment and the information against Ryan must be here printed in full. In the last case the division of the court below presents only the question of the constitutionality of the statute aforesaid so that indictment will not be reprinted.

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No. 26. UNITED STATES *v.* MURRAY STANLEY.

STATEMENT.

At the term of the district court of the United States of America in and for the said district of Kansas, begun and held at Topeka, in said district, on the 10th day of April, in the year of our Lord one thousand eight hundred and seventy-six, the grand jurors of the United States of America, duly empaneled, sworn, and charged to inquire of offenses committed within the district of Kansas, upon their oaths do find and present that one Murray Stanley, late of the district of Kansas aforesaid, on the tenth day of October, in the year of our Lord one thousand eight hundred and seventy-five, at the district of Kansas aforesaid, and within the jurisdiction of this court, being then and there in charge and having management and control of a certain inn, did then and there unlawfully deny to one Bird Gee, then and there a citizen of the State of Kansas and of the United States of America, full and equal enjoyment of the accommodations, advantages, facilities, and privileges of said inn by then and there denying to said Bird Gee the privileges of then and there partaking of a meal, to wit, of a supper, at the table of said inn, for such purpose then and there provided, he, the said Murray Stanley, having then and there so as aforesaid denied to said Bird Gee the aforesaid full and equal enjoyment of the accommodations, advantages, facilities, and privileges of said inn, for the reason that he, the said Bird Gee, was then and there a person of color and of the African race, and for no other reason whatever, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States of America. (Record, 1, 2, and 3, 4.)

The foregoing indictment was demurred to; and, upon argument of the demurrer, the judges were divided in opinion upon these questions:

1. "Does the indictment state an offense punishable

by the laws of the United States, or cognizable by the Federal courts"?

2. "Is the act of Congress entitled 'An act to protect all citizens in their civil and legal rights,' approved March 1, 1875, constitutional"?

That statute is prefaced with a preamble, and reads as follows:

Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than five

hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.

SEC. 3. That the district and circuit courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses against, and violations of, the provisions of this act; and actions for the penalty given by the preceding section may be prosecuted in the Territorial, district, or circuit courts of the United States wherever the defendant may be found, without regard to the other party; and the district attorneys, marshals, and deputy marshals of the United States, and commissioners appointed by the circuit and Territorial courts of the United States, with powers of arresting and imprisoning or bailing offenders against the laws of the United States, are hereby specially authorized and required to institute proceedings against every person who shall violate the provisions of this act, and cause him to be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States or Territorial court as by law has cognizance of the offense, except in respect of the right of action accruing to the person aggrieved; and such district attorneys shall cause such proceedings to be prosecuted to their termination as in other cases: *Provided*, That nothing contained in this section shall be construed to deny or defeat any right of civil action accruing to any person whatever by reason of this act or otherwise; and any district attorney who shall willfully fail to institute and prosecute the proceedings herein required, shall,

for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action of debt, with full costs, and shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not less than one thousand nor more than five thousand dollars: *And provided further*, That a judgment for the penalty in favor of the party aggrieved against any such district attorney, or a judgment upon an indictment against any such district attorney, shall be a bar to either prosecution respectively.

SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

SEC. 5. That all cases arising under the provisions of this act in the courts of the United States shall be receivable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court. (18 Stats., 335 to 337.)

No. 37. UNITED STATES *v.* MICHAEL RYAN.

STATEMENT.

This was an information in the circuit court of the United States, ninth circuit, district of California, in the form following:

Be it remembered that on this 12th day of February, A. D. 1876, comes into court, in his own proper person,

Walter Van Dyke, esq., United States attorney for the aforesaid district of California, and in the name and on the behalf of the United States gives the said court to understand and be informed that on the 4th day of January, A. D. 1876, at the city and county of San Francisco, State of California, and within the district aforesaid, and within the jurisdiction of this court, Michael Ryan, then and there being, did then and there wilfully, knowingly, and unlawfully, deny to a citizen of the United States the full and equal enjoyment of the advantages, accommodations, facilities, and privileges of a public theatre, such denial being for reasons by law not applicable to citizens of every race and color, to wit, the said Michael Ryan, on said day, at said city and county, did knowingly, wilfully, and unlawfully deny to George M. Tyler, a citizen of the United States, the full enjoyment of the accommodations, advantages, facilities, and privileges of Maguire's new theatre, situate on Bush street between Montgomery and Kearney, being on the southerly side of said Bush street, in the city and county of San Francisco, State of California, aforesaid, the same being a place of public amusement, as follows, to wit, that is to say, on the said 4th day of January, A. D. 1876, the said George M. Tyler did purchase a certain ticket of admission to said theatre of the ticket-seller or authorized agent of said theatre, for the sum of one dollar, which sum said Tyler duly paid to said agent, to wit, said ticket-seller, a certain printed ticket of admission to the said theatre, and to the part thereof known and designated as the dress-circle or parquette, and orchestra seats, which said dress-circle, otherwise known as the parquette, and said orchestra seats, did possess superior and better advantages, facilities, and privileges to any other portion of said theatre; which said ticket did purport to admit, and did entitle said George M. Tyler to admission to the said portion of said theatre known and designated "the dress-circle," otherwise called the "parquette," and to that portion of the said theatre known and designated the "orchestra" seats.

And on said fourth day of January, A. D. one thou-

sand eight hundred and seventy-six, in the evening of said day, and about or between the hours of seven and eight o'clock p. m., while the doors of said theatre were open for the purpose of admitting the public to, and about the time of the hour of the commencement of the performance in said theatre, said George M. Tyler, then and there being a citizen of the United States, and under the jurisdiction thereof, did then and there present said ticket in his own person to said Michael Ryan, who was the doorkeeper to admit persons with tickets, and ticket-taker of said theatre, standing at the proper entrance thereof, and did, upon said ticket, ask and demand admission to said theatre, and to the part and portion thereof designated as the dress-circle, otherwise called the parquette, and the orchestra-seats thereof; and thereupon said Michael Ryan, then and there being as aforesaid, did then and there wilfully, knowingly, wrongfully, and unlawfully, by force and arms, deny to said George M. Tyler, as aforesaid, admission to said theatre, or to any part thereof, and did then and there deny as aforesaid, to said George M. Tyler, the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of the said theatre, said denial and refusal not being for reasons applicable by law to citizens of every race and color, and regardless of any previous condition of servitude; that said refusal and denial as aforesaid was solely and entirely on account of and for the reason that said George M. Tyler was and is of the African or negro race, being what is commonly known and called a colored man, and not a white man. That said George M. Tyler was then and now is a person of the African or negro race, being what is known and commonly called a colored man.

And so the said attorney of the United States, in the name and behalf of the United States, gives the said court to understand and be informed that said Michael Ryan did then and there as aforesaid, on said day, in the manner aforesaid, commit the crime of unlawfully denying and refusing to a citizen of the United States the full enjoyment of the accommodations, advantages,

facilities, and privileges of a theatre (the same being a public place of amusement), for reason not by law applicable to citizens of every race and color, regardless of any condition of previous servitude, contrary to the form of the statutes of the United States of America in such case made and provided, and against the peace and dignity of the people thereof. (Record, 4.)

A demurrer was filed to this information, together with a motion to dismiss it. (Record, 4, 5.)

The court sustained the demurrer and ordered the information to be dismissed. (Record, 5.)

ASSIGNMENT OF ERROR.

The United States assign for error the sustaining of the demurrer and the dismissal of the information.

No. 105. UNITED STATES *v.* SAMUEL NICHOLS.

A demurrer was filed to the indictment in this case; "and the demurrer to the indictment herein coming on now to be heard, and the judges of this court being divided in opinion on the point of the validity under the Constitution of the United States of the statute under which said indictment is drawn, * * * it is ordered on the request of said parties that said point be certified under the seal of the court to the Supreme Court of the United States," &c. (Record, 6.)

BRIEF.

As no informalities have been pointed out in the indictment and information, we shall confine this brief to the main question, common to the three cases, of the constitutionality of the statute upon which they are founded.

Inns are provided for the accommodation of travelers; for those passing from place to place. They are essential instrumentalities of commerce (especially as now carried on by "drummers"), which it was the province of the United States to regulate even prior to the recent amendments to the Constitution.

The relation of innkeepers to the State differs from that of a man engaged in the more common avocations of life. The former is required to furnish the accommodations of his inn to all well-behaved comers who are prepared to pay the customary regular price.

This business and that of conducting a theatre are carried on under a license from the State, through the intermediate agency of municipal authority, which is part of the machinery of the State, being delegated to this extent with the power of the State. This is because the business to be carried on is quasi public in its nature, and for the general accommodation of the people.

For this reason Congress has the right to prohibit any discrimination against persons applying for admission to an inn or theatre based upon race, color, or previous condition of servitude.

The early amendments to the Constitution were added further to limit the Federal power. The last three, the result of bitter, costly experience, were intended to en-

large that power. Such enlargement must necessarily be pro tanto a diminution of, or an encroachment upon, the power previously exercised by the State. These amendments also interfered, for the first time, with the relation borne by the citizen to his State, and with those institutions and regulations of a (so called) domestic character.

This innovation was not so dangerous to liberty as many theorists imagine. Both State and National Governments are mere machinery by which the individuals composing the nation secure life, liberty, rights, and privileges. From time to time, as experience demonstrates the necessity or expediency of so doing, the people may change the mutual adjustment, or even the essential character, of this machinery to accomplish the desired purpose.

It was thought that the lately emancipated portion of our fellow-citizens could more safely depend for the security of their newly acquired rights upon the government which conferred them than upon that which had so long denied them. It may be remarked, in passing, that the greatest freedom is only attainable through the agencies and operation of the Federal Government. In one State, discriminations are made on account of religion; in another, upon the acquisition of land or other property; in a third, upon the basis of color; and in another, by reason of Mongolian birth. It is in Federal legislation and in the action of Federal courts alone that these discriminations are wholly disregarded.

Equality before the law, then, is the privilege of American citizenship, conferred by the national Constitution; therefore, to be protected by national legislation.

(16 Wall., 79; United States v. Reese, 92 U. S., 214, 217, where the court say that appropriate legislation "may be raised to meet the necessities of the particular right to be protected.")

The exclusion complained of in the causes at bar were because of the race and recent servile condition of the persons excluded. The law forbidding such exclusion, for such motive, is "appropriate to efface the existence of any consequence or residuum of slavery." (Hon. F. T. Frelinghuysen in debate on this bill; vol. 2, Cong. Rec., pt. 4, first session Forty-third Congress, p. 3453, end of first column.) At the bottom of the same page he cites the Slaughter-House cases as holding "that freedom from discrimination is one of the rights of United States citizenship."

What the United States had the right to give, it necessarily has the right and duty to preserve and protect.

We cannot proceed against or deal with the States to procure needed legislation; nor compel action by the grand juries of a State. We must necessarily prosecute directly those offenders who deny, on account of race or color, that equality which the Constitution guarantees.

The fourteenth amendment made native-born colored men citizens of the State in which they were resident. Their State citizenship originated in the national Constitution. Therefore Congress may legislate to compel the concession to them of such rights, whatever they may be, as are conceded to other citizens of the State, without dictating what those privileges may be; except that, in discharge of the duty imposed by other articles of the Constitution, the Federal Government must see

that there is no denial of liberty, nor such legislation as will deprive the State of its republican form of government. The fundamental right to liberty, and to participate in the choice of rulers, and to be equal to every other citizen in the enjoyment of lawful privileges, is secured to the colored man by recent amendments. As Mr. Edmunds remarked, these amendments did not mean to leave the Constitution just as it was before; so "that every man, woman, and child in a State shall have whatever rights the laws of that State choose to give every man, woman, and child in that State." (Cong. Rec., vol. 2, pt. 5, Forty-third Congress, first session, page 4172, second column.)

Power to *enforce* by appropriate legislation these constitutional amendments, giving liberty and equality, does not mean simply to re-enact their prohibitions. It means to legislate as to those particular matters and things in which equality is denied.

Their meaning and purpose must be gathered from "the history of the times." (Slaughter-House cases, 16 Wall., 67, 68.)

Upon that same page first cited (67) the court say that, "in the construction of those articles" they have only considered them as applicable to the case then in hand, which did not involve the rights of colored citizens; to which these amendments, as the court say, in the succeeding pages of that report, particularly relate.

In the enumeration of privileges by Judge Washington, in Corfield *v.* Coryell (4 Wash., 380, 381), quoted in the Slaughter-House cases, he speaks only of the rights of citizens of *States*, because that was the only question before him. The enumeration, however, is of those privileges belonging to the citizen of any free, well-consti-

tuted, republican State—and not as peculiar to those forming the American Union. Therefore they belong to citizens of the United States, as such, as well as to citizens of the several States, as such citizens.

The distinction noted by Mr. Justice Bradley (16 Wall., 117, bottom), that Judge Washington was speaking of the privileges of citizens *in* a State, not of citizens *of* a State, is peculiarly pertinent here.

It is purely accidental and immaterial that the several persons denied access to inn or theatre in the cases now pending were residents of the States in which the offences were committed. Their right to equal accommodations would have been the same had the travellers been citizens of New York or of this District, temporarily in Missouri or Kansas. This suggestion shows that the right secured by the legislation in question accrues to one as a citizen of the United States, and not as the citizen of a State.

As noticed by Mr. Justice Field, in his opinion in the Slaughter-House cases, the fourteenth amendment "was adopted to obviate objections which had been raised and pressed with great force to the validity of the civil-rights act," &c. (16 Wall., 93, near bottom.)

Upon a subsequent page he says: "This act, it is true, was passed before the fourteenth amendment was adopted, as I have already said, to obviate objections to the act; or, speaking more accurately, I should say, to obviate objections to legislation *of a similar character*, extending the protection of the national government over the common rights of all citizens of the United States. Accordingly, after its ratification, Congress re-enacted the act, under the belief that, whatever doubts may have

previously existed of its validity, they were removed by the amendment." (16 Wall., 96, 97.)

The correctness of this statement will be seen by reading the debate upon the proposition to submit that amendment for adoption. Though the language of legislators in debate cannot be used to control the legal effect of the phraseology employed, as to any single clause or sentence, the universal acquiescence of all the speakers as to the general scope and purpose of an act may be read, as part of the history of the times, to determine the meaning to be attached to the words employed—the sense in which they are used, and the force to be given them.

The first civil-rights act was passed April 9, 1866. (14 Stats., 27–30.) Though not identical in phraseology with that above printed, not containing this provision as to inns, &c., it is "of a similar coaracter". The debates upon the passage of that bill will be found in volume 70 of the Congressional Globe, for the first session of the Thirty-ninth Congress, pp. 1160–1833. Doubts were then expressed as to the constitutionality of that measure, which Mr. Bingham, of Ohio, and others, thought should be remedied by further amendment of the Constitution. (*Ib.*, 1291.)

Upon the 8th of May, 1866, the proposed fourteenth amendment was first discussed in the House of Representatives. (71 Cong. Globe, 2459, *et seq.*) Hon. Mr. Boyer said: "The first section embodies the principle of the civil-rights bill. * * * The fifth and last section of the amendment empowers Congress to enforce by appropriate legislation the provisions of the article." (*Id.*, 2467.) Mr. Broomall said that, while he did not

agree with those who thought the civil-rights act unconstitutional, "yet it is not with that certainty of being right which would justify me in refusing to place the law *unmistakably* in the Constitution." (*Id.*, 2498.) Other declarations to the same effect can easily be found in the report of the House proceedings.

Similar expressions are found in the Senate debate: *e. g.*, Mr. Doolittle said: "The celebrated civil-rights bill, which was the forerunner of this constitutional amendment, *and to give validity to which this constitutional amendment is brought forward*," &c. (*Id.*, 2896.)

It would be strange if language avowedly chosen to effect a desired object, and deemed apt for that purpose by a large majority, if not by everybody, in each house of Congress, should now be held by the court not such as to accomplish the end contemplated. The intent of the legislator would not then be the law.

The case brought up in debate against the enactment of the existing law, under the fourteenth amendment, was the Slaughter-House case. It seems as if, but for that case, the sole opposition to this measure would have been directed to the question of expediency and not of constitutionality. Yet that case was decided upon issues entirely outside of any which those now submitted present. It involved only the determination of the proper limits of the *police power* of the State. Every member of the court held that *if* the law of Louisiana, giving to one corporation certain rights as to the landing and slaughter of cattle for the markets of New Orleans and adjacent parishes, was an exercise of police power *merely*, it was valid. Upon the question of its being such an exercise of police power, the court divided; a bare majority held it was within that power and the minority that it exceeded that power, or was not an exercise of it. All agreed, too, if it were not an exercise of that power, the law was invalid.

No question of police power arises in the present cases, or under the legislation upon which these cases are based. Leaving out that element, and the opinion of every member of the court in the Slaughter-House case sustains the validity of this act.

In the course of a speech in the Senate by Mr. Stockton against the bill he alluded to the opinion in that case, and Mr. Morton interrupted him with this question: "I ask him if Judge Miller did not say in the same opinion that whatever rights and obligations were conferred or created by the fourteenth amendment belonged to citizenship of the United States as such, and were under the control and guardianship of Congress?" To which Mr. Stockton replied that he had no doubt that such language was used, though he had not the volume of reports by him to determine it. (Vol. 2 Cong. Rec., Pt. 5, first session Forty-third Congress, p. 4147.)

At the close of Senator Stockton's speech, Mr. Howe, of Wisconsin, took the floor, and said:

I admit that when the Constitution was framed originally, there was committed to the Government of the United States no power to do the things we propose to do in this bill. I admit when that Constitution was framed its makers committed the status and condition of individual citizens to the control of the States within which they lived. What they pleased to do with the individual, that they did. There was a malign power reserved to the government of every State to deprive any one or any number of its citizens of every the commonest rights of the commonest man, and they did it. The time was when every State did it. The time is, thank God, when no State can do it. That malign power no longer exists in any government in this land acknowledging the supremacy of the Constitution of the United States. The Constitution has been changed. Some prerogatives have been withdrawn from the States; some new faculties or powers have been given to the Government of the United States. Three whole chapters have been added to the organic law. One of them, I say in

the face of the country, as well as in the face of the Senate, was made on purpose to transfer the control of citizens to the Government of the United States; and if Congress does not possess to-day the power to snatch from the oppression of unequal laws every colored citizen of the United States, it is not because the people did not mean to clothe us with that power; but it is unmistakably because the draughtsman who framed the fourteenth amendment did not know enough to construct a clause which would give us that power. (2 Cong. Rec., Pt. 5, first session, Forty-third Congress, p. 4147, May 22, 1874.)

In the progress of his speech, as reported upon the next page of the Congressional Record, the same gentleman thus referred to the citation of the Slaughter-House case by the opponents of the bill:

And yet we are told that that very point has been already decided. We are told that the Supreme Court of the United States have declared in advance that we have not authority to pass this bill. That is a mistake, in my judgment. The Supreme Court of the United States never have told me any such thing. I stand here to deny that they have ever said any such thing. * * * The only point which the court asserted was that a statute passed by the State of Louisiana was not in contravention of the fourteenth amendment. That act made no discrimination between a white man and a black man. It made, I think, broad discrimination between the rights of white men—a discrimination which, upon my soul, I believe the fourteenth amendment condemns—but not a syllable of discrimination between the two colors. The court undertook to say that it was but an exercise of the ordinary police powers, which belonged to every State before the fourteenth amendment was adopted, and were not taken from the States by the fourteenth amendment, and then the court went on—or the judge who delivered the opinion of the court goes on—to defend that conclusion, entering upon an

argument to prove that such an act did not contravene that one clause of the fourteenth amendment which declares that no State shall impair the privileges and immunities of citizens of the United States. (*Id.*, 4148, second column.)

In closing the Senatorial debate upon the bill, just before the vote was taken, February 27, 1875, Mr. Edmunds, of Vermont, said:

The Constitution of the United States, as was stated in an opinion of the Supreme Court once by an eminent Democratic judge, is a bill of rights for the *people* of all the States, and no State has a right to say you invade her rights when under this Constitution and according to it you have protected a right of her citizens against class prejudice, against caste prejudice, against sectarian prejudice, against the ten thousand things which in special communities may from time to time arise to disturb the peace and good order of the community. That is all which this bill undertakes to do. Now let us see what this bill is.

The first section of it simply provides that all persons shall be entitled to certain common rights in public places, in the streets if they were in—they are not in, but that illustrates it—that no State shall have a right, and no person shall have a right, to interrupt the common use by citizens of the United States of the streets of a town or city. Where is the authority for that, Senators ask; where is the authority for saying that a State shall not have a right to pass a law which shall declare that all citizens of the German race shall go upon the right-hand side of the streets, and all citizens of the French race shall go upon the left, and so on; and that all people of a particular religion shall only occupy a particular quarter of the town, and all the people of another religion another side? Is it possible, with a national constitution which creates fundamentally a national citizenship, that anybody can say a State has a right to make laws of that kind? I should be

amazed to hear it stated. If that can be stated, then I should be glad to know what there is in being a citizen of the United States that is worth a man's time to devote himself to defend for a single instant.

What is it to be a citizen of the United States, if, being that, a citizen cannot be protected in those fundamental privileges and immunities which inhere in the very nature of citizenship? And there is the fault into which my honorable friends on the other side have fallen in arguing this constitutional question. The question is not whether citizens of a particular character, either as to color or religion or race, shall exercise certain functions; but the question is the other way. It is that no citizen shall be deprived of whatever belongs to him in his character as a citizen; and what belongs to a man in his character as a citizen has been long in a great many respects well understood. There was the old Constitution, the fourth article, you remember, which said that citizens of each State should be entitled to the privileges and immunities of citizens of the several States. What did that mean? That has received a judicial interpretation.

By common consent of all parties, before this gravest question arising out of the rebellion and the war had been forced upon us, the courts had held, with universal acceptance, I believe, that there did belong to citizens certain inherent rights which could not be denied to them; and that you could not, under the Constitution of the United States, either through State or other authority, set up distinctions which interfered with these fundamental privileges. Perfectly consistent with that, as everybody knows, you may say that in order to fulfill a certain function in the State, or to hold a certain office, all citizens alike must conform to certain qualifications. * * * The only thing that the Constitution says is that there shall never be a distinction in respect to the rights which belong to a citizen in his inherent character as such. Now, what are those rights? Common rights, as the common lawyers used to say; common rights, as the courts of the United States have said,

under the fourth article. Among those may be enumerated—it may be that you cannot make a precise definition, but you can always tell, when you name an instance, whether it falls within or without it—the right to go peaceably in the public streets, the right to enjoy the same privileges and immunities, without qualification and distinction upon arbitrary reasons, that exists in favor of all others. That is what it is. Then apply it to this bill, and what have you? You say it shall not be competent for any person, either under the authority of a State or without it, to exclude from modes of public travel persons on the ground that they have come from Germany, like my distinguished friend behind me, or that they have come from Ireland, as some other Senators here may have come, or that their descent is traced from Ham, Shem, or Japhet. And yet Senators seem to be greatly alarmed when this simple proposition of common right inherent in everybody is put into a statute-book, which carries out a constitution which declares that every privilege and every immunity of an American citizen shall be sacred and protected by the power of the nation. That is all there is to it; and those, therefore, who go fishing and talking dialectics about attorneys and about slaughter-house cases and police regulations find themselves entirely wide of the mark.

The real thing, Mr. President, is that there lies in this Constitution, just as in Magna Charta, and in the bills of rights of all the States, a series of declarations that the rights of citizens shall not be invaded. These bills of rights do not say that A or B or C or any class shall hold an office or be a witness or a juryman, or walk the streets. They only say that these common rights, which belong necessarily to all men alike, shall not be invaded on the pretense that a man is of a particular race or a particular religion.

At this point the designated time for taking the vote upon the bill arrived. (Vol. 3 Cong. Rec., Part 3, second session Forty-third Congress, page 1870.)

It is thought unnecessary to try to add anything to what was said in support of the law in question.

CHARLES DEVENS,
Attorney-General.
EDWIN B. SMITH,
Assistant Attorney-General.

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109-3463

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES
vs.
STANLEY.
[*Kansas.*] } No. 1.

THE UNITED STATES
vs.
RYAN.
[*California.*] } No. 2.

THE UNITED STATES
vs.
NICHOLS
[*Western Missouri.*] } ~~No. 4.~~ 3

THE UNITED STATES
vs.
HAMILTON.
[*Middle Tennessee.*] } No. 460. 204

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

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THE UNITED STATES
vs.
STANLEY.
[*Kansas.*] } No. 1.

THE UNITED STATES
vs.
RYAN.
[*California.*] } No. 2.

THE UNITED STATES
vs.
NICHOLS.
[*Western Missouri.*] } No. 4.

THE UNITED STATES
vs.
HAMILTON.
[*Middle Tennessee.*] } No. 460.

BRIEF FOR THE UNITED STATES.

These are cases of criminal proceedings for violations of the civil rights act of 1875 (below). The cases of *Stanley* and *Nichols* present *indictments* for refusing to admit colored persons into *inns;* that of *Ryan* is an *infor-*

mation for refusing to admit a colored person to the *parquette of a theater*, and that of *Hamilton*—an indictment for excluding a colored person from *the first-class cars of a railroad train.*

The *information* was dismissed below; the other records present certificates of division.

The Thirteenth amendment of the Constitution and so much of the Fourteenth as is applicable here, are as follows:

XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

XIV.

SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Upon the 9th of April, 1866 (14 Stat., 27), Congress enacted certain provisions in the civil rights act of that year; these, in connection with additional provisions of like nature (sections 16 and 17), were formally re-enacted by the eighteenth section of the enforcement act of May

31, 1870 (16 Stat., 144), and are now contained in sections 1977, 1978, 1979, and 5510 of the Revised Statutes, from which they are here taken:

SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

SEC. 1978. All citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

SEC. 5510. Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects or causes to be subjected any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties on account of such inhabitant being an alien or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars or by imprisonment not more than one year, or by both.

The act now directly under consideration, that of March 1, 1875 (18 Stat., 335, Richardson's Supplement, 148), is as follows:

Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of

government in its dealings with the people to mete out equal and exact justice to all of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,

Be it enacted, &c.

[SECTION 1]. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings either under this act or the criminal law of any State. *And provided further*, That a judgment for the penalty in favor of the party aggrieved or a judgment upon an indictment shall be a bar to either prosecution respectively.

SEC. 3. That the district and circuit courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offences against, and violations of, the provisions of this act; and actions for the penalty given by the preceding section may be prosecuted in the Territorial, district, or circuit courts of the United States wherever the defendant may be found without regard to the other party; and the district attorneys, marshals,

and deputy marshals of the United States, and commissioners appointed by the circuit and Territorial courts of the United States, with powers of arresting and imprisoning or bailing offenders against the laws of the United States, are hereby specially authorized and required to institute proceedings against every person who shall violate the provisions of this act, and cause him to be arrested and imprisoned and bailed, as the case may be, for trial before such court of the United States or Territorial court, as by law has cognizance of the offence, except in respect of the right of action accruing to the person aggrieved; and such district attorneys shall cause such proceedings to be prosecuted to their termination as in other cases: *Provided*, That nothing contained in this section shall be construed to deny or defeat any right of civil action accruing to any person, whether by reason of this act or otherwise; and any district attorney who shall willfully fail to institute and prosecute the proceedings herein required, shall, for every such offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action of debt, with full costs, and shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not less than one thousand nor more than five thousand dollars: *And provided further*, That a judgment for the penalty in favor of the party aggrieved against any such district attorney, or a judgment upon an indictment against any such district attorney, shall be a bar to either prosecution, respectively.

SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

SEC. 5. That all cases arising under the provisions of this act in the courts of the United States, shall be reviewable by the Supreme Court of the United States without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court.

It may be proper to submit here a doubt which occurs in connection with the form of proceeding in *Ryan's* case; *i. e.*, whether the above act of 1875 can be enforced by an *information*?

That act (section 2, proviso 2) gives a choice of remedy, *either* a *civil* one or a *criminal*,—*not both*.

The *form of remedy* in the former case is *expressly* given; *i. e.*, *an action of debt*. Nothing is said directly as to the form of proceeding for the misdemeanor.

But an implication may perhaps be gathered from the 2d proviso of section 3 that this proceeding also is *fixed*, and is to be *by indictment* alone. Probably Congress did not intend by the language of that proviso that a judgment for the criminal "prosecution" shall be a bar to the civil "prosecution," only when the former is *by indictment*, leaving such judgment upon *an information* unprovided for. The suggestion, on the contrary, seems to be, that *indictment is to be the only form of the criminal prosecution* under consideration; *i. e.*, that judgment upon any criminal proceeding shall be such a bar; "indictment" and "criminal proceeding" being used in the statute as equivalent.

If the form of proceeding in *Ryan's* case is inadmissible, the questions certified therein to this court, were, of course, coram non judice, so that the question as to the Federal rights of persons to seats in theaters does not now arise.

In the other cases, which concern Federal rights in *inns* and upon *railroad trains*, it seems that the proceedings are sufficient to raise the questions proposed.

In the indictment against *Stanley* the description of the party *denied* possibly may not show that he had applied to the defendant *for such accommodations as he was entitled to receive*. An innkeeper is not bound to furnish supper to all persons who demand it, but only to travelers, or at all events, to "guests. (Calye's case, 8 Co., 32, and 1 Smith Lead. cas.) [194]. It may be that as regards others he can exercise choice or caprice as to the race of persons to be admitted to his table; *i. e.*, may deny this one, and admit that.

Submitting this suggestion without more words, because the constitutional question involved there is identical with that in the case of *Nichols*, and is like that in *Hamilton's* case, the proceedings in both of which appear to be valid, I proceed to the indictment against *Nichols*, which in form is as follows:

> The grand jurors * * * present that * * * one Samuel Nichols, late of said district, was the keeper and proprietor of a public inn for the accommodation of travelers and the general public—that is to say, a certain common inn called the Nichols House * * * that one W. H. R. Agee was then and there a citizen of the United States of America and of the State of Missouri, and a person of color, and one of the Negro race, within the jurisdiction of the United States, and he, the said W. H. R. Agee, being then and there a traveler, was then and there an applicant to the said Samuel Nichols * * * for the accommodations, advantages, facilities, and privileges of said inn as a guest therein; but he, the said Samuel Nichols, then and there did deny to the said W. H. R. Agee admission as a guest in said inn, and the full and equal enjoyment by him, the said W. H. R. Agee, as such guest, of the accommoda-

tions, advantages, facilities, and privileges of said inn * * * for the sole reason that he, the said W. H. R. Agee, was a person of color and one of the Negro race, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

I premise that upon the subject of *inns* the common law is in force in Missouri, except as regards the matter [unimportant here] of *responsibility for baggage*, &c.

The only questions upon *the form* of the above indictment that have occurred to me are, (1) is it alleged that *Agee* applied for such entertainment as an innkeeper is bound to give; and (2) should it have been alleged that he *tendered pay*, or, at least, that he was *ready and willing to pay*. (Rex *vs.* Ivens, 7 C. & P., 213, Eng. ed., n.; and Fell *vs.* Knight, 8 Mees. & Welsby, 269.)

(1.) As to the first point, I submit that the allegation that *Agee* applied for the accommodations, &c., "*as a guest*" is sufficient. In this connection the term of "guest" is one *of art*, well known in law as a correlative of "innkeeper." (Norcross *vs.* Norcross, 53 Maine, 163; Fell *vs.* Knight, 8 Meeson & Welsby, 269; Walling *vs.* Peter, 23 Conn., 183; Shoecraft *vs.* Bailey, 25 Iowa, 553.) It denotes one who receives food, lodging, &c., *under the special dealing incident to innkeeping;* and, therefore, in pleading, is a sufficiently *certain* statement of all the matters which it includes. (Stephen's Plead., 354.)

(2.) As regards *tender*, &c., the denial in question was so explicit as to the grounds thereof that any tender, and, of course, allegation of tender, became unnecessary.

I come now to the principal question in this case:

Is the above act of 1875 constitutional?

This is understood to depend upon its conformity to the provisions of one or other of the *constitutional amendments* quoted above.

Several weighty judgments upon each of these amendments have been delivered by this court, and to these, as greatly facilitating the present investigation, it will be proper to advert in the first place.

In the Slaughter-house Cases (16 Wall., 36), it was held that a legislative grant by Louisiana of certain exclusive rights of slaughtering cattle within a territory of 1,154 square miles, including New Orleans, was valid as a *police regulation*, and was not within the prohibitions of either of the above amendments. In discussing this question, the Opinion of the court holds that the thirteenth amendment, although intended primarily to abolish *African* slavery, equally forbids any other form of involuntary servitude, however named; also, that the first clause of the fourteenth amendment protects against hostile State legislation such privileges and immunities only as belong to citizens of the United States *as such; ex. gr.*, such as those that arise out of the Federal Constitution, the nature and essential character of the National Government, &c.

Four justices dissented from that judgment and Opinion, and held (waiving a decision upon the thirteenth amendment) that the fourteenth amendment protects citizens of the United States against deprivation by State action of their *common rights*, meaning thereby those

privileges and immunities which of right belong to the citizens of *all free governments; ex. gr.*, that of immunity from disparaging and unequal enactments whilst in the pursuit of the ordinary avocations of life.

By Bradwell *vs.* The State (16 Wall., 130), a refusal by the supreme court of Illinois to grant a woman license to practice law, on the ground of the ineligibility of females *under the law of that State, i. e., the common law*, violated no right of the applicant under either the thirteenth or the fourteenth amendment.

The Opinion of the court affirms the above-cited argument in the Slaughter-house Cases. Concurring in the *judgment* of the court, four justices place themselves solely upon the ground that the right to practice law is not one of the immunities or privileges of women *as citizens in general.*

By Bartmeyer *vs.* Iowa (18 Wall., 129), a right to sell intoxicating liquors is not one of the privileges, &c., of citizens of the United States, or protected by the fourteenth amendment against the usual and ordinary legislation by States regulating or prohibiting such sales.

Concurring in that judgment, because such usual legislation is proper as a police regulation, three justices (a vacancy having occurred in the seat of Chief Justice Chase, one of the four *dissentients* above) again dissented from the argument of the court.

By Minor *vs.* Happersett (21 Wall., 162), the fourteenth amendment does not confer upon a *woman* a right to vote, and therefore the provision of the Illinois State constitution confining the right to vote for electors for President, &c., to *males*, is not invalid.

The Opinion goes upon the ground that such right was not coextensive with "citizenship" in the State at the

time of the adoption of the amendment, and that the latter did not *add* to the rights previously included in such citizenship.

Walker *vs.* Sauvinet (92 U. S., 90) was a case in which a licensed coffee-house keeper in New Orleans had refused refreshments to a colored person, and the latter had brought suit thereupon in a State court, under a State statute providing that, if upon the trial of such a case the jury should not agree, the same should be immediately submitted to the judge, upon the pleading and evidence already on file, whereupon he should decide the same at once.

Held, that States have a right to regulate trials in their own courts in their own way; and therefore that a jury trial, in suits at common law in such courts, is no *privilege* or *immunity* of national citizenship within the fourteenth amendment.

In United States *vs.* Reese (92 U. S., 214), it is held that an inspector of a municipal election in Kentucky was guilty of no offense against the United States for refusing to receive the vote of a citizen of the United States of African descent, on account of his race, &c., the third and fourth sections of the enforcement act of 1870, upon which the charge in question was drawn, having failed to create an offense *because of race*, &c.; as specified in the constitution, and also in the indictment.

In Kennard *vs.* Louisiana (92 U. S., 480), it is held that a State statute, providing certain speedy and peremptory proceedings to determine contests for judgeships therein, did not violate the fourteenth amendment by depriving persons of property *without due process.*

By United States *vs.* Cruikshank (92 U. S., 542), the fourteenth amendment, in *guarantying* persons against action by the States, depriving them of life, &c., without due process, or of the equal protection of the laws, does not empower the United States to enforce rights to life, &c., *generally; ex. gr.*, against infringement by private persons.

In Munn *vs.* Illinois (94 U. S., 113), it is held that a State statute regulating charges for the use of *grain elevators* does not violate the fourteenth amendment by *depriving* persons of their property, &c.; because such elevators are devoted to a public use, and so are affected with a public interest in the same way as *ferries*, *inns*, *warehouses*, *&c.*

The case of the Chicago, &c., Railroad Company *vs.* Iowa (94 U. S., 155), applies the same rule to a railroad company, and is followed by four other cases; (reported 94 U. S., 164, 179, 180, and 181, n.).

[In Blyew *vs.* The United States (13 Wall., 581), an indictment against *whites* for the murder of a *colored* person in Kentucky, in which the colored witnesses for the prosecution were incompetent by the State law: *Held*, that the case was not one "affecting" either the *deceased*, or the *witnesses* excluded, within the meaning of the Civil Rights act of 1866: giving jurisdiction to courts of the United States over "all causes civil and criminal *affecting persons* who are denied" certain rights.]

[By Brown *vs.* Railroad (17 Wall., 445), in a case where a train consisted of two passenger cars alike comfortable, the foremost of which upon the down trip became hindmost upon the return, a regulation that in going down the first should be set apart for colored persons and the last for whites, such use to be reversed upon the return,

was held to be a violation of an amendatory provision in the charter (A. D. 1863) "that no person shall be excluded from the cars on account of color."]

[In Hall *vs.* De Cuir (95 U. S., 485), a Louisiana statute required common carriers to make no discrimination on account of race or color as regards passengers. Thereupon the supreme court of the State, in a case where a colored person traveling from New Orleans to another place within Louisiana, upon a steamboat *which plied betwixt the former place and Vicksburg in Mississippi*, had been excluded by the captain on account of her race and color from a cabin reserved for whites, decided that the captain was amenable to the statutory penalty: *Held*, *upon error*, that such provision was a regulation of *inter-State commerce*, and therefore unconstitutional.]

In Strauder *vs.* West Virginia (100 U. S., 303), a colored man had been convicted of murder by a jury drawn under a State law which rendered colored men ineligible as jurors. Before the trial he had duly applied for removal of the case into the circuit court of the United States, and—upon this being refused,—to quash the venire, &c., because of the above legislative provisions: *Held*, *upon error*, that the fourteenth amendment entitled the prisoner to trial by a jury drawn without regard to race or color, &c.

The Opinion of the court in this case declares that although in form the fourteenth amendment is only *prohibitory*, in effect it creates *a positive immunity* for the party in whose behalf its prohibitions exist—*i. e.*, a constitutional interest in having the action of the State (through all its agencies) *undiscriminating* in respect of race, &c., and of the *protection* which it affords.

In ex parte Virginia (100 U. S., 339) it is held that

the provisions of the act of 1875 (above), making it a misdemeanor in State officers charged with any duty in selecting jurors to exclude any citizen on account of race, &c., is constitutional, and applies to the case of officers charged with that *ministerial* duty even although *in other respects* they may be State judges, entrusted with *discretion*, &c.

In Missouri *vs.* Lewis (101 U. S., 22) it is held that the fourteenth amendment, in guarantying equal protection of the laws, does not forbid or qualify the power of the States to regulate the jurisdiction of their own tribunals by *geographical lines*, as, for instance, to give an exclusive jurisdiction over appeals from certain counties to one tribunal, and over others to another, even although the latter tribunal be for certain purposes the *superior* of the former.

The court, however, *reserves*, in this connection, the consideration of any cases that may arise in which such geographical lines are resorted to for the purpose of indirectly discriminating against *races*, &c.

In Neal *vs.* Delaware (103 U. S., 370), it is held that the mere retention upon the face of State constitutions and statutes, of provisions limiting the right of suffrage to whites, that were in force before and at the time of the adoption of the fifteenth amendment, *no subsequent State legislation to like effect existing*, does not make a case of State violation of that amendment; also, that in case citizens are excluded as jurors on account of race and color by State jury commissioners, the refusal of the State court to grant a motion to quash an indictment found by such jurors, is *error* for which a judgment against the defendant will be reversed.

Upon the whole, these cases decide that—

(1.) The thirteenth amendment forbids all sorts of involuntary personal servitude (except penal) as to all sorts of men, the word servitude taking some color from the historical fact that the United States were then engaged in dealing with African slavery, as well as from the signification of the fourteenth and fifteenth amendments, which must be construed as *advancing* constitutional rights *previously existing:*

(2.) The fourteenth amendment expresses prohibitions (and consequently implies corresponding positive immunities), limiting *state action only*, including in such action, however, action by all State agencies,—executive, legislative, and judicial,—of whatsoever degree:

(3.) The fourteenth amendment warrants legislation by Congress punishing violations of the immunities thereby secured when committed by agents of States in the discharge of ministerial functions.

Referring once more to the indictment against *Nichols*, it appears—

(1.) That the right violated by him [being indeed of the same class as that violated by *Stanley* and by *Hamilton*] is *the right of locomotion.*

(2.) That in violating this *Nichols* did not act in a capacity exclusively *private*, but in one *devoted to a public use, and so affected with a public* [*State*] *interest.*

Upon behalf of the United States it is therefore submitted, also, that—

(3.) Restraint upon the right of locomotion was a well-known feature of the slavery abolished by the thirteenth amendment.

(4.) Granting that by *involuntary servitude*, as prohibited in the thirteenth amendment, is intended some *institution*, viz, custom, &c., of that sort, and not primarily mere scattered trespasses against liberty committed by private persons, yet, considering what must be the social tendency in at least large parts of the country, it is "appropriate legislation" against such an institution to forbid any action by private persons which in the light of our history may reasonably be apprehended to tend, on account of its being incidental to quasi public occupations to create an *institution*.

(5.) Therefore, the above act of 1875, in prohibiting persons from violating the rights of other persons to the full and equal enjoyment of the accommodations of inns and public conveyances for any reason turning merely upon the race or color of the latter, *partakes of the specific character of certain contemporaneous solemn and effective action by the United States to which it was a sequel*—and is constitutional.

Discussing these topics in the order named:

1. It seems obvious that "the power of locomotion," mentioned by Blackstone (Book 1, chap. 1), is a power which draws to itself all corresponding "facilities" which being from time to time devised by human ingenuity are progressively taken up amongst the *common* needs and *common* rights of any existing generation. To make use of language employed by the court in the Telegraph Company case, 96 U. S., p. 9: this *personal* power, like the powers of government there referred to, keeps pace with the progress of this country and adapts itself to

the new developments of time and circumstances, appropriating all new agencies successfully brought into use to meet the demands of increasing population and wealth. Its earliest illustrations may have been only such as relieved persons from confinement within four walls, or established that freemen were not adscripti glebae, appendages to manors or districts of country; but successively, beginning in common-law countries before the memory of man, it has vindicated the right of everybody to the *highway*, to the use of inns, and more lately to that of *passenger carriers*, and it stands ready to advance along the path of civilization and appropriate from time to time whatever of that sort human ingenuity may devise, and common sense may pronounce to be *an advantage which must be made common to all, or otherwise the "pursuit of happiness" will degenerate into a monopoly.*

I submit, therefore, that in accordance with a general law of progressive civilization, to the effect that the luxuries of one generation become the necessities of the next, the right to use an inn or a train of cars (certain reasonable conditions common to everybody being observed), is one of the rights of locomotion, and therefore a high constitutional right.

In the passage already referred to, Blackstone speaks as follows:

> Next to personal security the law of England regards, protects, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article [Personal Security]; that it is a right strictly natural; that the laws of England do not assume to abridge

it without sufficient cause: and that in this Kingdom it cannot ever be abridged without the express permission of the laws. (Book 1, ch.1.)

It is true that, in discussing this proposition, Blackstone does not refer to the topic now under discussion, turning attention mainly to topics in connection with the writ of *habeas corpus*. Considering the state of travel one hundred years ago and before, this may be accounted for upon other grounds than by supposing that such topic was not meant to be included.

Hundreds of thousands of persons are probably at every moment of time *travelers* at some point or other within the United States. In course of the year probably *billions* of passengers make use of public conveyances here. The American Almanac for the year shows that by late returns 600 millions of passengers used conveyance by railway trains alone in Great Britain during a year; whilst in the State of New York the number of *passenger-miles* traveled by trains was more than a billion. The development occasioned during the century by a revolution in manners thus glanced at has occasioned perhaps the principal cotemporaneous expansion of jurisprudence. Attempts to digest the rights and powers of certain artificial persons created in the same connection into a system that shall not conflict with the constitutional rights of natural persons. has, in the mean time, become one of the chief troublers of the thoughts of statesmen—on the bench, in the legislature, and in the closet.

If Blackstone had written a century later, the chapter in question would no doubt have had illustrations and speculations pertinent to "the power of locomotion" more appropriate to the present topic; but as things

have turned out, the duty of filling up a part of the picture may have been devolved upon this court.

(2.) The circumstance that in violating *Agee's* right of locomotion *Nichols* did not act in a capacity exclusively private, but in one devoted *to a public use, and so affected with a public* [State] *interest*, seems proper to be mentioned here. The phrase here employed will be recognized as taken from the *Elevator* cases, in 94 United States, already cited.

It is submitted that if State law appropriates inns to public use, then innkeepers, being persons invested with the duty of distributing this use, possess to a certain extent the character of public officers, *i. e.*, officers or agents of the State. So that if they obstruct in practice that enjoyment of which by law they are the ministers, inasmuch as in the nature of the case such obstruction is practically privation of the rights (there being no way in which a *remedy in specie* can be administered), the allegations in this indictment make a case directly under the fourteenth amendment.

I submit this view, although it is to be admitted that the statute of 1875 does not limit its action to agents of the State, and may not be susceptible of division into parts, any one of which has such limitation. If so, the government here is confined to a contention that the legislature, in dealing about *institutions*, or *action* forbidden *to States*, can forbid any action by private persons *which may reasonably be apprehended as tending to such institution or action.*

It is in such matters that courts will probably be most reluctant to interfere with the legislature. The faculty

required to pass upon the situation being so peculiarly *legislative*, as distinguished from judicial, that a court, impressed otherwise with the wisdom of the maxim *obsta principiis*, would probably be more than ordinarily disposed to solve every doubt in favor of the law.

I come now to discuss more expressly the *Federal questions involved* in these cases.

(3.) Restraint upon the rights of locomotion was a characteristic feature of the particular form of slavery abolished by the thirteenth amendment.

Under either of the two theories suggested in the Opinions in the Slaughter-house cases, and traceable subsequently in the reports of the decisions of this court, the establishment of this proposition would render plainly unconstitutional any *State action* authorizing the action reprobated by this indictment; and therefore, as I have already submitted, would warrant, and even *demand*, legislation by Congress having in view the suppression of action *by anybody* which reasonably tends to bring about such State action.

It seems unnecessary to elaborate this point. It is, as has been said by this court in another connection, "too recent to be history,"—that a first requisite of the right to appropriate the use of another man was to become the master of his natural power of motion, and, by a mayhem therein of the common law, to require the whole community to be *upon the alert* in aiding the master to restrain that power. By a travesty upon ordinary

and constitutional modes of speech, "locomotion" became—"running away"; and "entertainment,"—"harboring." This incident was of the very essence of the institution. Every slave State was compelled to enforce it by statutes progressively more and more stringent—striving thereby to meet a tide of hostility to the institution that was rising from year to y ear under, amongst other matters, the powerful influence of *locomotive machinery and steam*. This legislation was treated by the courts as *remedial*, and therefore to be interpreted with favor. The State Reports present many cases to this general purpose.

In the State of Missouri, from which the case of *Nichols* comes, we have in the year 1846 the case of *Eaton s. Vaughan* (9 *Missouri*, 734), the head-note to which is as follows:

> In an action of trespass against the captain of a steamboat for taking away a slave on his boat, it is not necessary to show that he knew the person to be a slave.
>
> 2. Ordinary diligence used in attempting to ascertain if he were a slave is no justification to the person carrying the slave away.

The facts of that case are too elaborate to be inserted here. But it appeared that the runaway had *free papers*, to *the description* in which he bore resemblance, and which were shown to the *captain* to be genuine, before the slave (a mulatto) was received. Suspicion having arisen the man was examined several times during the voyage the result being a conviction that he was the person represented in the free papers.

The court said:

> Every negro [overruling in this connection a suggestion that, as held in several other States in this respect, there was a distinction betwixt *pure* and *mixed* blooded persons: the runaway in question being of the latter sort] asserting his right to freedom is presumed

a slave, and it devolves on him to show his right to the condition which he claims. It is true that slaves have volition; they may leave the service of their masters, and may impose themselves on others for free men, but it is necessary for the security of the owners of such property that they who treat them as such should do it at their peril.

The court below having instructed the jury that they might give smart money, the Supreme Court said that it was a mistake so to charge, but that as there were expenses in endeavoring to recover him, the excess of damages was not so great as to warrant them in setting the verdict aside. They add:

We do not feel assured, all things considered, that such a course would ultimately prove an advantage to the defendant. There is nothing in this transaction which throws the least suspicion upon the purity of Capt. Eaton's conduct. That some diligence was employed by him cannot be denied, but that a greater degree of diligence would in all probability have prevented the loss to the plaintiff candor compels us to avow. We think that the hope of making his escape on the boat manifestly induced the slave to run away. The facility of escaping on the boats navigating our waters will induce many slaves to leave the service of their masters. Their ingenuity will be exerted to invent means of eluding the vigilance of captains, and many ways will be employed to get off unnoticed. One escape by such means will stimulate others to make the attempt. The greater portion of our eastern frontier, being only separated by a navigable stream from a non-slaveholding State, inhabited by many who are anxious, and leaving no stone unturned to deprive us of our slaves, our interior being drained by large water-courses, by means of which its commerce in steamboats is maintained with the city on our frontier, render it necessary that the strictest diligence should be exacted from all those navigating steamboats on our waters, in order to prevent the escape of our slaves. Our citizens, aware of the circumstances by which they are surrounded, will not weigh in golden scales the damages that may result to the owners of slaves from a relaxation of that

degree of diligence which is necessary to secure them against losses. This determination they will carry with them in their jury rooms, and it is not for the courts to weaken or destroy the force of a determination necessary to protect a species of property which, whether for weal or for woe, has been entailed upon us by those who are now making the most clamor about it.

I call attention to this passage as a temperate expression of the law as received in the States in which slavery prevailed.

Inasmuch, then, as in times of slavery legislation like the act of 1875 would have touched that institution at the quick, its *specific* relation thereto can readily be recognized.

(4.) I now submit that, granting that by "involuntary servitude" as prohibited in the Thirteenth Amendment, is intended some *institution* of that sort, and, primarily at least, *not* mere scattered trespasses against personal liberty committed by private persons, yet, it is "appropriate legislation," under the second section of that Amendment to forbid any action by private persons which a legislature, in view of history or otherwise, may reasonably apprehend as threatening to result in State recognition of such an institution.

It seems that the circumstance that the sort of action forbidden by the act of 1875 is action *in the course of certain business transacted with the public* makes a substantial difference as regards such action and *crimes against life and liberty*, such as were before this court in Cruikshank's case, and as to which it is said (92 U. S., p. 553, bottom): "It is no more the duty or within the power of the United States to punish for a conspiracy, to falsely imprison or murder within a State, than it

would be to punish for false imprisonment or murder itself." There is no reason to apprehend that acts of mere violence may become a political institution. But as regards innkeepers and passenger carriers, whose conduct is so much *a mere reflection of the views of the community*, it is probably otherwise. The action of such persons testifies to, and at the same tends to enlarge, a particular current in *public opinion*, and this in its turn is fruitful of *public, i. e., State* institutions.

Is it not a mere matter of legislative discretion to decide upon the stage of growths at which it will be best to suppress such vegetation?

The significancy of the action of *Nichols* is that it is *representative.* It shows not only his private views as to accommodating this race in inns, &c., but the views of whole communities of citizens, upon whom their history has naturally imposed these views.

Congress has taken notice of this, and courts *also* will take notice of it, or, at all events, will admit that notice thereof may well be within the reach of *legislative* organs of perception, and therefore is a matter not to be criticised by themselves. It is to notice so taken by Congress that the preamble of the statute of 1875 indirectly refers. I submit that the phenomenon thus indicated points not remotely to a birth of corresponding State institutions, and that it is in the interest of national peace and good feeling to nip such institutions in the bud.

(5.) It follows that the act of 1875 is constitutional in the feature now in question.

I will add in this connection no more than that in some points of view it will be an extraordinary result

if that feature shall be found to be unconstitutional; for therein it conforms to a series of acts (as above), which began in 1866, and has received the express sanction of Congress upon four different occasions during nine years, some of the concurring members of that body at the same time being not only distinguished as constitutional lawyers, but being also persons who were in public life contemporaneously with the whole contest, in war and subsequent peace, which ended in destroying slavery; and were also active parties in considering and settling the particular terms of the constitutional provisions under which they afterwards legislated. If in respect to a great feature like this, to wit, repressing all action *by persons* that savors of an enforcement of odious characteristics of the slavery which they have met, vanquished, and abolished, they have erred fundamentally time and again during years, it is, I submit, a circumstance much to be wondered at.

In the mean time it may be believed that their Statutes are in accordance with their Amendments and with the logic of the Events of the war which they supported; that they have been right in apprehending that every rootlet of slavery has an individual vitality, and, to its minutest hair, should be anxiously followed and plucked up; and that as to scattered disparagements of persons on account of race and color, incidental to certain public callings, and by persons who notably are sensitive registers of local public opinion, the epigrammatic proposition of Junius is applicable, to wit, that what upon yesterday was only "fact" will become "doctrine" tomorrow.

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